Supreme Court, U.S.
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No. 10-833 DEC 14 2010

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In the

Supreme Court of the United States

OSAMA ELDEEB,

Petitioner,

v.

ALLIEDBARTON SECURITY SVCS., L.L.C., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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December 14, 2010

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QUESTIONS PRESENTED

The Third Circuit affirmed the district court's judgment dismissing all of Petitioner's claims by summary judgment. Petitioner had filed claims against his employer and another company at his work site, alleging discrimination based on his national origin and his religion. Petitioner is of Egyptian national origin and is a Muslim. He claimed that he was the victim of disparate treatment, that he was subjected to a hostile work environment, that he was retaliated against for opposing and complaining of discrimination and that he was constructively discharged. He also claimed that the other company and one of its employees had violated state law by aiding and abetting discrimination and retaliation.

Three questions are presented:

1. Under the standards set by the United States Supreme Court and/or the Third Circuit, is it legally inappropriate to dismiss an employment discrimination claim(s) by summary judgment, in favor of the employer, when the employee has produced sufficient evidence creating genuine issues of material fact on those claims, including evidence showing or tending to show that the employer's decisions where motivated by illegal discrimination?

2. Under the standards set by the United States Supreme Court and/or the Third Circuit, is it legally inappropriate to dismiss an employment discrimination claim(s) by summary judgment, when there has been a failure to consider all of the evidence in a manner which favors the nonmovant (employee), when there has been a failure to make reasonable

inferences from the evidence, and when there are genuine issues of material fact on all or some of the claims, by which a reasonable jury could find in the employee's favor?

3. Under the standards set by the United States Supreme Court and/or the Third Circuit, is it legally inappropriate for a court deciding a summary judgment motion, and subsequently the appellate court, to affirm such decision, when those courts have determined the employer's intent and the alleged discriminators' intent in favor of the employer, when there are genuine issues of material fact, based on the evidence, bringing that intent seriously in to question, including on the issues of whether there was disparate treatment, whether there was a hostile work environment, whether there was retaliation, and whether the employee was constructively discharged?

LIST OF PARTIES

The parties below are listed in the caption.

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Not Applicable for Petitioner.

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STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

The Third Circuit's opinion was rendered on October 16, 2010. This petition follows.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 2000e-2(a)(1)

(a) Employer practices

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or priviliges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

1. Petitioner was employed by Allied Spectraguard Security ("Allied") as a security guard, starting in early 2003. During his employment with it, he was an excellent worker, who had received an commendation

from the president of IMS (another company at his work site), and the highest ranking personnel at the work site. IMS contracted with Allied through a third company, "Insignia", to perform security services at its site in suburban Philadelphia. Petitioner is of Egyptian national origin and the Islamic faith. At all times relevant to the allegations in his complaint, he was a United States citizen.

During his employment with Allied, Petitioner was subjected to various incidents of discrimination and ultimately retaliation based on his national origin and his religion. One of his coworkers would taunt him about his name, comparing him to Osama bin Laden. Petitioner explained that in Egypt, that his first name is very common. Also, the name is considered a gift of God, and one's parents. The name "Osama" has a positive connotation in Egyptian. Plaintiff was denied a reasonable accommodation for his religious prayers for his religion, Islam. By his religion, he is required to pray five time per day, at designated times. He requested from his supervisor, Mr. Russell, that just for Mondays, that he be allowed to switch his lunch hour with another personnel to make prayer. Mr. Russell summarily denied him the request without even asking the other worker whether she was willing to switch times. Additionally, although Petitioner needed a private location to pray, Mr. Russell would not designate any particular area for the prayer. Consequently, Petitioner was left on his own to find a private location to pray. Russell also told him that he was not to let anyone else at the work site, see him pray. This left Petitioner to secretly attempt to find an empty room each Monday he worked so that he could pray. Upon information and belief, Christians were

not told that they had to pray in secret and could pray anywhere they wanted on the work site, at any time.

Another employee told Petitioner that he did not respect Muslims for, "killing people like that", apparently suggesting that all Muslims were accountable for various alleged atrocities associated with Iraq, perhaps Saddam Hussein, and terrorism. Petitioner was upset enough about that incident, that he documented it in his work log, for the purpose of letting his supervisor, and his second level supervisor (manager), Mr. Wilson, know that he was being harassed. However, he never received any feedback from either man, of any corrective actions for the coworker's conduct, although the managers were supposed to read the work log, and address irregularities documented in it.

Mr. Wilson and Mr. Russell also made remarks that negatively stereotyped and generally blamed people of the Middle East, for the harm that came to United States soldiers in the Iraq War. After Saddam Hussein was caught, they both quickly and joyfully approached Petitioner while he was working, and stated that they had just "got one, "now we just need to get the other one" (referring to Osama Bin Laden). Petitioner was for a loss, as to why the comments were directed to him, as he never indicated anything other than allegiance to the United States, and his belief in the peaceful tenants of Islam. He had made clear during conversations with Wilson, which Wilson initiated, that he did not agree with the actions of Bin Laden or violent terrorists. Mr. Russell repeatedly mocked Petitioner, by intentionally mispronouncing his name, as an ongoing joke. To be able to continue to support his family, Petitioner tried to tolerate the

aforementioned discrimination and harassment as best that he could, particularly since it was coming from his supervisors (managers) as well as coworkers. Mr. Russell refused to address repeated requests for a religious accommodation for prayer, and he would falsely accuse Petitioner of work errors. His apparent dislike for Petitioner made it difficult for Petitioner to trust him with concerns related to harassment.

In/around February 2004, while he was performing security duties, Mr. Wilson brought a Ms. Adamek to meet him. Wilson introduced him by name, also indicating that the woman was some important employee for IMS. She immediately told Petitioner that his name, "Osama" was very bad, and that he needed to change it immediately. Petitioner was embarrassed and angry, and he responded that his name was a gift from God, and that he would not change it for anyone. In the Egyptian language, his name has a positive connotation. Wilson had told Adamek that Petitioner was from Egypt, and that he was a Muslim. In response to Adamek, Petitioner rhetorically asked both Wilson and Adamek, if any person in the United States, with the first name of Timothy, should have to change that name, based on the acts of the "Oklahoma City bomber", Timothy McVeigh. Adamek merely responded, "there you go". In a separate conversation, shortly after wards, Wilson told Petitioner that after World War II, that many people changed their first name from Adolf, as a result of the acts of Hitler. Petitioner was highly offended by the aforementioned conduct of Adamek and Wilson. Wilson never gave Petitioner any feedback that he had addressed Ms. Adamek about the issue of her harassing him about his name and national origin/religion. In the conversations described above,

both Adamek and Wilson had insulting and/or condescending tones, which were highly offensive to Petitioner.

For the next approximate five months, virtually every time that Petitioner would see Adamek as she entered the work cite, passing his guard shack for entry, she would taunt and harass him, by stating his name in a negative tone, and shaking her head up and down, and stating "um hum". She also stated the words "a ha" and would laugh as if to mock Petitioner. Petitioner interpreted the words and nonverbal acts as some attempt to intimidate him, and possibly to harm his employment status and to embarrass him. Her tone was not one of an innocent gesture. Petitioner tried to endure the taunts by concentrating on his work. Adamek would not say anything else which could be interpreted as an attempt to be friendly, rather it was clear that she was repeating her disapproval and disdain for Petitioner due to his Egyptian name and/or otherwise. Petitioner estimated that the occurrences at the guard shack occurred as many as twenty times over around five months, or around weekly. To his knowledge and belief, Petitioner was the only person from Egypt, and perhaps the only Muslim working at the work site. Petitioner would observe Ms. Ademak having friendly interactions with Mr. Wilson on repeated occasions on the work site. He would also see her having friendly interactions with Mr. Jerbasi, of Insignia (the man who eventually falsely accused him of not working for hours at a time on July 24-25, 2004).

On July 19, 2004, while entering the site with her son (a new employee), Adamek called Petitioner, "Saddam", and than stated, "oh no, you are Osama" (It

was evident from Petitioner's clear name tag, what his name is). Petitioner finished assisting Adamek's son with his identification. Shortly thereafter, he called IMS's president's office and spoke to the secretary telling her what had just happened (the President was not in). She invited him to discuss the matter further or to take it back to Allied. Petitioner had not gone to his supervisors because they were not on site, and because they had previously engaged in and endorsed the discriminatory acts against him, based on his national origin and/or religion. Later, on the same date, Mr. Russell confronted Petitioner on the site and told him he should not have taken his complaint to IMS. Mr. Jerbasi had a conversation with Ms. Adamek that same day, regarding Petitioner's complaint. On Petitioner's next work day on July 22, 2004, he was summoned to report for a meeting with Allied's Human Resources manager, Mr. Martzell, with Mr. Russell present (rather than working). Martzell essentially told him that he was in error for making his complaint to IMS - there was no promise to correct Ms. Adamek's conduct. Several days later Petitioner was working on the weekend on July 24-25. On the following Monday, Mr. Jerbasi contacted Mr. Wilson and accused Petitioner of not working for hours at a time over the weekend. On July 27, 2004, Petitioner's next work day, Mr. Wilson called him and told him not to report to his regular work duties, but rather to report to another Allied manager, Mr. Owens on July 28, 2004. Owens told Petitioner that a decision was made that he would be "transferred" from the site, and that he would be informed of the new position, when and if one became available. In the mean time, Petitioner would not be receiving pay or benefits from Allied. Additionally, Mr. Owens told him that in the event that he was ever harassed again

while working, that he had two choices. One was to simply attempt to ignore it; the other was to request to take the rest of the day off, from his supervisor. Under no circumstances was he to make a complaint about what had occurred. Additionally, Allied kept his uniforms and his name tag (but denied knowledge of the whereabouts of his personal items - Petitioner believes this was an additional incident of harassment). On July 28, 2004, Mr. Wilson authored and issued Petitioner a "Final Warning"disciplinary action, falsely accusing him of not working for hours at a time on July 24-25, 2004. The form indicated he would be transferred. Petitioner had never committed any previous disciplinary offense, and was not deserving of a "final warning" under Allied's own procedures for "progressive discipline. In writing, Petitioner disputed the allegation in writing and informed Mr. Wilson and anyone else in writing, that they could prove that he was working, by checking the site's security cameras and the computerized system, which monitored when he entered various locations during his security patrolling ("roving"). During discovery in this matter, Petitioner discovered what purportedly is the second page of the disciplinary action Wilson gave him, a document prepared by Mr. Wilson, which identified Petitioner as being a problem and stating that he needed to be removed from the work site. Petitioner was not given or shown this second page at the time that he was disciplined, nor at any other time before he requested documents from Allied, after he sued it in federal court. Petitioner believes that the document is direct evidence of retaliation, because he complained to IMS about Ms. Adameks' national origin/religious harassment. It is also noteworthy regarding the issue of the employer's state of mind to retaliate, that the document was

hidden, and that it was written on a separate piece of paper, and not in the first page of the disciplinary form.

As a result of the Allied's "reassignment"/"transfer" decision, Petitioner was left without work. He had no income, and effectually, he was suspended without pay. As a result thereof, he immediately sought new employment. He also filed a complaint with the Pennsylvania Human Relations Commission alleging discrimination and retaliation, based on his national origin and his religion. Petitioner submits that in reality he was terminated, and his lawsuit contains a count for constructive termination/discharge. As a result of Allied's, IMS's and Insignia's treatment of him, Petitioner suffered extreme emotional distress, including that based on their collective decision not address and correct the acts against him that he could no longer tolerate to work for Allied, after its discriminatory conduct and endorsement thereof by Adamek, Jerbasi and their respective companies.

No case law supports the specious theory as indicated in the Third Circuit's decision, that retaliation did not occur (as a matter of law), because Allied offered Petitioner a position some four-five weeks after it essentially laid him off or indefinitely suspended him without pay. Additionally, at the time of the suspension, Allied took back its uniform and identification badge reasonably informing Petitioner that his employment was over. It was unacceptable to Petitioner that he would be required to merely tolerate discrimination and harassment in the future at the whim of any coworker and/or supervisor as he was admonished by Mr. Owens.

Ms. Adamek, Mr. Wilson, and the plant manager for Insignia, Mr. Jerbasi, were all friends. On occasions, Petitioner would see them interacting in a friendly manner on the work site. Based on his own interactions with Jerbasi and Adamek, in particular, he reasonably perceived that neither person liked him. Once, Jerbasi treated him in a hostile manner, when Petitioner merely tried to engage him in casual conversation about a work related matter. Mr. Wilson authored the following words on the concealed second page of the Disciplinary Counseling Statement related to Jerbasi's and his concerted effort to sabotage Petitioner's employment on a false basis, after he complained to IMS about Ms. Adamek's discriminatory and harassing treatment.

> "Mr. Jerbasi also complained that S/O ("security officer") Eldeeb attempted to meet with the president of IMS and vice president at IMS Human Resources regarding a statement by an IMS employee commenting on S/O Eldeeb's first name. Mr. Jerbasi believed this should have been brought to the attention of the site supervisor, Jimmy Russell, or the account manager, Frank Wilson. Mr. Jerbasi believes a situation exists which prevents S/O Eldeeb from remaining at IMS and has asked that he be removed."

Under Allied's procedures, Petitioner's call to IMS in the form of opposition to and/or complaint against discrimination, was not a violation any Allied documented procedure or verbal procedure for making such complaints. Additionally, as stated above, Mr. Russell was one of the people who was harassing Petitioner, and he had no obligation to wait for that

supervisor to return to work to address (protest) the discrimination he was encountering. Moreover, Russell had engaged in the same type taunting as Adamek, taunting his name and his Egyptian accent on a repeated basis.

Petitioner reasonably interpreted his treatment as a constructive termination, because it was an indefinite suspension without pay, and there was no promise by Allied, that he would be allowed to return to work at any work site. Additionally, his uniform and security badge were taken, evidence that there was no guarantee that he would be returned to work. Under a reasonable person standard, Petitioner was justified in seeking new employment as soon as possible. Additionally, even "if" he were allowed to return to work, it was only under a discriminatory work rule, oror standard, that he could not complain about further national origin/religious discrimination. Per Manager Owens, he must either simply tolerate such behavior or he could request to take off the rest of the day. Allied informed him of its solidified position, that it would do nothing to alleviate and stop discriminatory conduct against him in the future.

REASONS FOR ALLOWANCE OF THE WRIT

The Third Circuit's decision has so far deviated from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the United States Supreme Court's supervisory power. Additionally, the Third Circuit has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court. More specifically, it has not followed the proper standards

for deciding employment discrimination cases upon the submission of an employer's motion for summary judgment.

Title VII prohibits discrimination based on either national origin, ethnicity or religion, and prohibits any discrimination in an employee's conditions of employment, even those which do not result in an adverse action. Here, not only has Petitioner been subjected to differential work conditions, including that as a statement of policy, that he must tolerate taunting based on his protected classes, but also, that he had no right to lodge a complaint against such discriminatory treatment, clear violations of Title VII and the Pennsylvania Human Relations Act (PHRA). Additionally, Title VII prohibits retaliation against employee's for exercising their right to protest discrimination. Here, there is no doubt that Petitioner was exercising his legal rights to oppose and/or protest illegal discrimination.

As a result of the conduct of the managerial employees of Allied and IMS, Petitioner filed a federal lawsuit in the Eastern District of Pennsylvania in February 2007, after he had filed an administrative complaint with the Pennsylvania Human Relations Commission on August 3, 2004, which was cross filed with the EEOC. Petitioner filed a separate federal defamation lawsuit against Insignia, based on the acts of Mr. Jerbasi, in 2005, which was settled in July 2006. In his 2007 lawsuit against Allied, IMS and Ms. Adamek, Petitioner alleged claims for discriminatory treatment, based on differential treatment, that he was subjected to a hostile work environment, based on either or both his national origin or religion, that he was constructively discharged, and that he was

subjected to retaliation for protesting /complaining about discrimination, and adding supplemental state law claims under the PHRA for discrimination and retaliation under that act. He sued IMS and Ms. Adamek for aiding and abetting discrimination under the PHRA.

The United States Supreme Court, the Third Circuit, and the Eastern District of Pennsylvania have enunciated and adopted clear standards for determining discrimination cases and retaliation cases under Title VII. Here, none of the defendants seriously challenged that Petitioner had established prima facie cases, for disparate treatment., including that Petitioner was a member of a protected class, that he was qualified for his position, that he was terminated or subjected to some other adverse action, and that he was replaced by someone outside of his protected class, or other facts, that might suggest discrimination. *McDonnell Douglass Corp. v. Green*, 93 S.Ct. 1817, 1824 (1973); *Pivorotto v. Innovative Systems, Inc.*, 191 F.3d 344, 352-55 (3d Cir. 1999). Here, Petitioner was indefinitely suspended from his job without pay ("transferred" to a less desirable condition). The evidence strongly suggests, that Petitioner was singled out for an unpaid suspension because he complained about being discriminated against based on his national origin and his religion. Petitioner correctly identified this claim as a constructive discharge, although factually he could also have been reasonably interpreted to have been either fired or laid off. His pay and benefits were indefinitely stopped with no definite promise that he would be reinstated.

Regarding his claims of a hostile work environment based on membership in protected class, the Supreme Court has established the legal standard for such claims: (1) that the plaintiff suffered intentional discrimination based on membership in a protected class; (2) that the discrimination was severe and pervasive; (3) that the plaintiff was detrimentally affected by the treatment; (4) that a reasonable person would have similarly been affected by the conduct, under the circumstances; (5) that there is a basis for employer liability. *Harris v. Forklift Systems, Inc.* 510 U.S. 17, 21, 114 S.Ct. 367 (1993). It is not necessary that a plaintiff establish direct evidence of animus based on the protected class to establish a hostile work environment claim, if the plaintiff can prove that had he been "white", that he would not have been treated in the same manner. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990). There is no "magic number" of incidents that presents a threshold to determine whether a work environment is abusive and hostile in violation of Title VII. *West v. Philadelphia Electric Co.*, 45 F.3d 744, 757 (3d Cir. 1995). Here, although the defendants challenged the issues of whether a reasonable person would have been detrimentally affected, essentially challenging the number of times that the incidents occurred, under WEST, supra., the Court's determination must not hinge on the number of incidents. Here, not only has Petitioner introduced evidence about Adamek's taunting every time he saw her (about weekly) for four months, but also various incidents of taunting by his managers, being suggested by his manager that he change his name, being harassed and taunted by coworkers, which was known to his managers, being denied a reasonable religious accommodation on an ongoing basis, without any justification, and being

suspended indefinitely without pay for no viable reason. Even if a fact finder chose to believe that Petitioner committed misconduct (a jury question), Allied had a progressive disciplinary policy which it violated with respect to Petitioner. An employer's violation of its own procedures is evidence of pretext for discrimination *Antol v. Perry*, 82 F.3d 1291, 1301 (3d Cir. 1996); *Stewart v. Rutgers University*, 120 F.3d 426, 434 (1997). Under the Third Circuit's own precedents for hostile work environment claims, Petitioner claim thereof should have survived summary judgment. In *Omari v. Waste Gas Fabricating Co., Inc.*, 2005 WL 545294 (E.D. PA 2007), there was sufficient evidence for a hostile work environment claim based on religion, based on seemingly "taunting" derogatory remarks about people of the middle east. In *Wheeler v. Voicestream Wireless Services*, 2005 WL 1240797 (M.D. PA 2005), some overt remarks about religion combined with facially neutral conduct provided sufficient evidence for a hostile work environment claim. In *Beaubrun v. Intercultural Family Inc.*, 2007 WL 172385 (E.D. PA 2007), the Court found sufficient evidence for a hostile work environment claim based primarily on facially neutral conduct, in combination with several remarks describing the Plaintiff as "a little Haitian girl. The court held that the mention of the Plaintiff's national origin and/or ethnicity was potential evidence that the employer's decisions were based on illegal discrimination, based on those factors. In *Irizarry v. Com. Dept, of Transportation*, 2000 WL 968220, the Court found that sufficient evidence existed to find a hostile work environment based on the plaintiff's Hispanic ethnicity/national origin, existed based solely on facially neutral conduct.

In *Abramson v. William Patterson College of New Jersey*, 260 F.3d 265 (3rd Cir. N.J. 2001), the Court found that Plaintiff had established a hostile work claim based on religion, as a Orthodox Jew, based on evidence consisting of the defendant yelling at him for taking off on Jewish holidays, for continually questioning him for taking off on the Jewish Sabbath, and because it scheduled an important office event on a Jewish Holiday, after the Plaintiff had announced that he would not be able to attend it, if it conflicted with the holiday. This case is highly analogous to some facts in this case, including that continual negative taunting remarks about people of the Middle East, questioning Plaintiff's politics based on his national origin and religion, and continually denying his a reasonable accommodation to pray, including the time and establishing a location to pray. In *Aman v. Cort Furniture*, 85 F.3d 1074, 1083 (3d Cir. 1996), the Court stated that the Supreme Court has recognized that employers who discriminate will almost never announce a discriminatory animus or provide direct evidence of discrimination. Use of code words may suffice to show discriminatory animus, e.g. "all of you", "one of them". Here, Wilson and Russell made reference to getting "one of them" directly to Plaintiff, insinuating that people of the Middle East were all the same. Additionally, while telling Plaintiff that his name was bad, to which Plaintiff objected, Adamek stated, "there you go" (reasonable inference she was referring to a stereotype of a person from the Middle East). Mr. Wilson reasonably adopted this mindset by not confronting Adamek, and by latter suggesting her position, that Plaintiff should change his name. Plaintiff need not provide evidence of slurs, etc. - facially neutral acts can form the basis for a Title VII hostile work environment claim. *Durham Life*

Insurance Co. v. Evans, 166 F. 3d 139, 148 (3d Cir. 1994). Additionally, the court should have taken into consideration the importance of Petitioner's name to his identity as an Egyptian and a Muslim. Essentially, Adamek and Wilson were trying to intimidate him to change his identity to suit there prejudiced tastes.

Here, Petitioner submits that the Third Circuit (and the lower court) committed legal error by determining that his hostile work environment evidence fell short of the threshold to present a jury question - that as a matter of law, that such conduct could not create a hostile work environment. The Third Circuit opined that the case might be different, had the defendant(s) called Plaintiff out of his name. Here, in fact on the incident which led him to finally protest the conduct to IMS, Ms. Adamek had called him out of his name, calling him "Saddam". However, the Court fails to provide some rationale for differentiating the taunting which is obviously based on Petitioner's national origin (his name comes from his Egyptian birth). The insinuation that Petitioner is a bad person because he shares the same first name as Osama Bin Laden, is equivalent to generally stereotyping a person from the Middle East, by referring to them as "Saddam" or some other so-called enemy of the United States. There is no doubt that in this case, Petitioner was being treated differently and worse than other people, based on the fact that is from Egypt and because he is Muslim. After the first Adamek encounter, Petitioner made it clear to her (and Wilson) that his name was directly linked to his national origin and his religion ("gift of God").

Regarding the constructive discharge claim, it appeared that the Third Circuit ignored the fact that

Petitioner was left with no reasonable recourse but to try to find other full time work as soon as possible to support his wife and children, rather than simply wait indefinitely for the mere possibility that he might be brought back to work (and particularly under the condition that he would have to tolerate further discrimination and was denied his legal right to complain or protest such conduct) under the erroneous finding that there was a good faith effort to bring Petitioner back to work. Here, Petitioner had complained of his discharge on August 3, 2004, to the PHRC, some three weeks before the new Allied job offer. There is a jury question, as to whether Allied had received notice of the PHRA complaint prior to the "offer". However, whether or not the offer was merely an attempt to settle the PHRC complaint, or whether it was made independently thereof, has nothing to do with whether Petitioner reasonably left the company (or was driven from the company) to pursue needed income immediately. There was no factual dispute that for a significant portion of time, that Petitioner was left in the darkness as to his future with Allied, and that he was not being paid. It can safely be said that Pennsylvania law requires that unemployed people attempt to mitigate their income loss, by seeking new work as soon as possible after being laid off. How long is an employee expected to sit around and wait at the whim of the employer, for a new position, without income?

The Third Circuit used the same flawed rationale in denying the validity of Petitioner's retaliation claims, e.g., that what occurred with respect from being immediately removed from his duties and job location, without pay, indefinitely, could not support a conclusion of retaliation as a matter of law, simply

because Allied offered to bring him back to work at some point in time. The affect of an approximate month's suspension without pay, reasonably affected Petitioner's lease, his credit, the status of health care of his family, and other life necessities over that month. The potential harm from Allied's acts, in collaboration with IMS cannot be minimized or disputed. Mr. Wilson's written words proved that the adverse action was done as a direct result of Petitioner's protest against discrimination. At a minimum, there is a jury question of whether the defendant's adverse action was based on a retaliatory motive. The legal standard for retaliation is that: (1) Plaintiff is a member of a protected class; (2) that he was engaged in protected activity; (3) that he was subjected to an adverse employment action; and (4) that there is a causal relationship between the engaging in protected activity and the adverse employment action. *Jalil v. Avdel Corp.*, 873 F2d 701, 708 (3d Cir. 1989). To establish a retaliation claim, a plaintiff need not prove the underlying discrimination claim, but only that he was acting under a good faith reasonable belief that a violation of Title VII occurred. *Jalil*, supra. Under EEOC guidelines, protected activity includes" (1) opposing a practice made unlawful by one of the employment discrimination acts, and (2) filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute. Here, it is clear that a prima facie case has been established, at a minimum. As stated above, Wilson's direct plain words explain that Petitioner was disciplined with an indefinite suspension and "kicked" off the site, because he opposed discrimination to IMS, about one of its employees. There is a jury question as to whether Petitioner committed any misconduct, e.g.

failed to perform his security rounds. Simply, Allied claims that he did so, and Petitioner denies doing so. Moreover, at the time of the "discipline", Petitioner attempted to have Mr. Wilson view the videotapes and check the computer system to prove that he had properly performed, and which would also prove Mr. Jerbasi to be a liar. The proximity between Petitioner's initial complaint to IMS, and then being falsely accused and then subjected to severe adverse action, all within around a week, give significant credence to Petitioner and the viability of pretext and his retaliation claim. Prior to his opposition to discrimination, Petitioner was cited as an excellent performer, had received an accolade from the president of IMS, and had no disciplinary record. A reasonable jury could simply find that the accusation that he simply did not work for several hours on July 24 or July 25, for hours at a time, has no merit, and that Mr. Jerbasi fabricated this allegation (and that he collaborated to further the effect of this fabrication with Mr. Wilson, to be rid of Petitioner because they feared that his complaint to the president of IMS, might create ramifications for themselves, and/or their friend and associate, Ms. Adamek). Mr. Wilson's written words on the Disciplinary Counseling Statement reflect that Petitioner had created a problem for all of the companies by bringing to light Ms. Adamek's conduct. A reasonable jury could find that Wilson and Allied retaliated against Petitioner to protect Ms. Adamek from disciplinary action, and to avoid an ongoing practice of discriminatory conduct on her part, by removing her target (rather than forcing her to change her behavior).

For all of his claims, Petitioner may prove through circumstantial evidence, that the defendant's proffered

reasons for its employment decisions are pretextual for illegal discrimination. *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 331 (3d Cir. 1995); *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994). A plaintiff may prove pretext by casting doubt on the employer's stated reason by identifying such weaknesses, implausibilities, inconsistencies, incoherences or contradictions in the employer's proffered reasons for its actions that a reasonable fact finder could rationally find them unworthy of credence. *Brewer*, supra, at 331. The fact finder's disbelief of the employer's stated reasons justifies an inference that the stated reasons are pretextual, particularly when the employer is suspected of mendacity. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48, 120 S.Ct. 2108-09 (1996). At the summary judgment stage, a plaintiff need not directly contradict each and every reason offered by the employer. *Antol v. Perry*, 82 F.3d 1291, 1300 (3d Cir. 1996). The question is not whether the record necessarily leads to a conclusion that the employer's stated reasons are pretextual, but simply whether the record could support an inference. *Sempier v. Johnson & Higgins*, 45 F.3d 724, 732 (3d Cir. 1995). A pretext analysis must be based on a totality of evidence, not on various facts taken in isolation. *Bray v. Marriott Hotels*, 110 F.3d 986, 991 (3d Cir. 1997). Here, Petitioner has successfully challenged the legitimacy and credibility of the employer as to whether he committed any misconduct which warranted disciplinary action, including a "final warning" for his first alleged incident. He had an exemplary record for from the beginning of his employment up until the time that he complained of discrimination. He pointed to evidence by which Wilson could objectively retrace his work, which Wilson refused to investigate. There was no

objective evidence of misconduct. The employer attempted to hid the second page of its July 28, 2004 disciplinary action from Petitioner, who did not find the document until discovery after he filed his lawsuit. Nobody corroborated Jerbasi's allegations of misconduct. Mr. Jerbasi, who allegedly was the highest level supervisor at the site on the weekend in question, did not use his authority, to simply tell Petitioner to return to work (in the past he had simply ignored Petitioner while the later attempted to engage him in a conversation about work). No evidence was presented as to how Jerbasi could know what Petitioner was doing during the alleged period of time that he wasn't working. Finally, it simply makes no sense that Petitioner would turn from being an exemplary hard worker to someone who was essentially malingering at work, particularly by doing so in the direct line of vision of Mr. Jerbasi, and with the knowledge that the security cameras and computerized check points (doors) could also prove whether or not he had performed his security duties, during the times that Jerbasi falsely alleged he was not working. Although the lower court stated that there was no record evidence about the availability of viewing security cameras and computer recordation, this is not true. In Petitioner's Statement of Facts, he documented these occurrences, including the existence of such mechanisms at the work site, to determine, whether a security officer had properly made his rounds, and which could prove the exact time that he performed his duties. He also documented these facts on the "final warning" form he was given for allegedly not working for hours at a time. A consultation of these mechanisms, would have proven Mr. Jerbasi to be a liar regarding his allegation that Petitioner was not working for hours at a time. Additionally, Mr.

Wilson's refusal to properly investigate these mechanisms, further strengthens Petitioner's claims of pretext here, that both Wilson and Jerbasi, collaborated to remove him from his position with either or both a discriminatory purpose or a retaliatory purpose. Additionally, the question begs, why Mr. Jerbasi, the highest authority on the site over that weekend, in claiming that Petitioner was not working, simply would not approach him, and instruct him to "get back to work". Finally, regarding this issue, even if there was any truth to the allegation that Petitioner had a poor performance, there is no record of any prior disciplinary or work related problems, and according to Allied's own written procedures for progressive discipline, the alleged incident did not warrant the "final warning" that was given, particularly when such warning had the effect of terminating his pay and benefits, immediately.

The lower court dismissed all of Petitioner's claims on summary judgment. Essentially, as summarized above, it determined that the evidence of discrimination could not amount legally actionable hostile work environment claim, suggesting that the taunting and negative stereotyping behavior of multiple employees, including Allied's managers, denial of a religious accommodation for prayer, and being disciplined and indefinitely suspended without pay and benefits, on a false basis, would not have been pervasive and severe for a reasonable person. Additionally, it appears that the lower court also opined that there was no evidence of any person outside of Petitioner's protected classes, who was treated more favorably than he. However, it was clear that Petitioner's theory of law, was that he was singled out for discriminatory treatment, based on his

protected classes. This singling out constituted "other conditions" that suggested discrimination under Title VII. Petitioner suffered the adverse actions of being transferred to a less desirable location ("kicked off the work site"), being suspended indefinitely without pay, and being constructively discharged. The fact that he could not identify, for example, a Caucasian Christian employee, who was taunted for his religion, complained about it, and did not suffer any adverse employment actions as a result thereof, should not have resulted in the dismissal of his claims, under the circumstances of the case. In fact, Petitioner claimed on information and belief that he was the only Egyptian born Muslim at the work site, and all of the evidence suggests that in totality, that he was singled out for disparate treatment based on his protected classes. The claims of retaliation were apparently dismissed on the lower court's theory that because Allied offered replacement work approximately a month after Petitioner's suspension without pay, that the first act was not done with retaliatory motive. This is not the law. The fact that Allied may have attempted to either correct the retaliation or simply to minimize its liability for lost wages (particularly after Petitioner complained to the PHRC of discrimination, and there is circumstantial evidence at a minimum, that Allied had notice thereof). The court recognized the casual nexus between Petitioner's complaint and Allied's adverse actions against him (around three days later). In fact, as soon as Allied found out about the complaint, its Human Resources Manager summoned Petitioner to confront him about making his complaint to IMS. By Petitioner's account of the meeting, the tone thereof, was that he was wrong for making the complaint , and that he had created some

problem for all of the companies, Allied, IMS, and Insignia.

The lower court also dismissed all of Petitioner's claims under the PHRA, on the theory that because Allied could not be charged with legal wrongs, that neither could IMS or Ms. Adamek have aided or abetted it in either or both discriminating and retaliating against him.

The United States Supreme Court and the Third Circuit Court of Appeals have delineated clear standards for dismissing cases, including particularly discrimination cases, on summary judgment. Federal Rule of Civil Procedure 56 (c) sets the standard for the granting of a motion for summary judgment. It should only be granted when the pleadings, depositions, answers to interrogatories and affidavits demonstrate that there is no genuine issue of material fact left to resolve at trial. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986). The purpose of summary judgment is to dispose of claims that are factually unsupported. *Celotex*, supra. 106 S. Ct. at 2533. To survive a motion for summary judgment then, the non-moving party must point to evidence demonstrating the existence of a genuine dispute of material fact, requiring a jury or judge to resolve the parties' different versions of the facts. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). *Matsushita Elec. Co. v. Zenith Radio*, 106 S. Ct. 1348, 1355 (1986).

Because employment discrimination cases turn on the state of mind and credibility of the defendant, summary judgment is generally inappropriate. *Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497

at 509 (3D Cir. 1996); *Jalil v. Avdel Corp.*, 873 F.2d 701, 706 (3d Cir. 1990) (when plaintiff provides evidence calling the defendant's intent into question, summary judgment is not appropriate). In the recent past, the Third Circuit has reversed may cases where the district courts have granted summary judgment too precipitously in employment discrimination cases. *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074 (3d Cir. 1996); *Antol v. Perry*, 82 F.3d 1291 (3d Cir. 1996); *Ambruster v. Uniys Corp.*, 32 F.3d 768 (3d Cir. 1994); *Brewer v. Quaker State Oil Refining Corp.*, 72 3d 326 (3d Cir. 1995); *Kowalsksi v. L&F Products*, 82 F.3d 1283 (3d Cir. 1996); *Marzano v. Computer Science Corp. Inc.*, 91 F.3d 497 (3d Cir. 1996). At the summary judgment stage, a plaintiff need not provide evidence directly contradicting the employer's proffered reasons. *Antol v. Perry*, 82 F.3d 1291, 1300 (3d Cir. 1996). *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). A party opposing summary judgment need not match item for item each piece of evidence proffered by the movant., but must simply exceed the "mere scintilla" standard. *Boyle v. County of Allegheny Pennsylvania*, 139 F.3d 386, 393 (3d Cir. 1998). A plaintiff can survive summary judgment by providing sufficient evidence from which a reasonable fact finder could infer pretext. *Ambruster v. Unisys Corp.*, 32 F.3d 768, 782-83. That is, the plaintiff must provide enough evidence to infer that the stated reason is a post-hoc fabrication or did not actually motivate the employer's decision. *Fuentes* 32 F.3d at 764. The question is not whether the record necessarily leads to a conclusion that the employer's stated reasons are pretextual, but simply whether the record could support such an inference. *Sempier v. Johnson Higgins*, 45 F.3d 724, 732 (3d Cir. 1995).

In an employment discrimination case, on a motion for summary judgment, the burden of persuasion remains unalterably with the employer as movant. The employer must persuade the court that even if all inferences which could reasonably be drawn from the evidentiary materials or record were viewed in the light most favorable to the plaintiff, no reasonable jury could find in the plaintiff's Favor. *Marzano*, 91 F.2d at 502. In other words, the defendants must show that the plaintiff will be unable to produce sufficient evidence to show a factual dispute. *Jalil*, 873 F.2d at 706.

In the matter, Petitioner produced sufficient evidence to survive summary judgment on all of his claims under the legal standards established by the United States Supreme Court, as well as the Third Circuit, as summarized above. There were genuine issues of material fact regarding discrimination based on national origin, whether Petitioner was subjected to a hostile work environment based on national origin and/or religion, and whether he was retaliated against in violation of Title VII (and the PHRA). Additionally, since those claims should not have been dismissed, there was also a genuine issue of material fact, as to whether IMS and Ms. Adamek were liable for aiding and abetting, and retaliating against Petitioner.

The Third Circuit indicated that there was no discrimination based on illegal considerations as a matter of law. The Third Circuit has previously held that a transfer to a less desirable position, as well as a demotion or a suspension without pay will suffice as adverse actions. Here, Petitionerhas established that he suffered an adverse employment action, because he was not being paid after he was "transferred" The

Supreme Courthas held that a tangible employment action, is one that inflicts direct economic harm. *Burlington Industries Inc. v. Ellerth*, 118 S. Ct. 2257 (1998). Even without a loss of pay, a transfer to a less desirable position can constitute an adverse employment action. *Dilenno v. Goodwill Indus. of Mideastern Pennsylvania*, 162 F.3d 235 (3d Cir. 1998); *Hampton v. Borough of Tinton Falls Police Department*, 98 F.3d 107 (3d Cir. 1996). As stated above, factually, although Allied termed its actions as a transfer, in effect Petitioner was either fired or he was suspended indefinitely without pay. He has established a constructive discharge. Under the Third Circuits standards, such constructive discharge is established by showing conduct which has the foreseeable result that the working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign. *Boneberg v. Plymouth Twp.*, 132 F.3d 20, 28 (3d Cir. 1997). Here, those results were that Petitioner was taken from his full time position, suspended indefinitely without pay, and given a specious possible offer of future employment, when and if something came up. In reality, Petitioner was fired or laid off. A reasonable person in his shoes, needing to support his wife and child, would immediately seek new employment and income and would be justified in resigning. Here, the evidence overwhelmingly shows that factually, he was terminated from employment.

Petitioner can prove discrimination by means other than comparison with other persons outside of his protected class, if he can point to other evidence which would tend to show discrimination. *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632 (3d Cir. 1993). Here, in addition to his firing or layoff, Petitioner has

also complained that he was denied a religious accomodation in violation of Title VII and the PHRA. Although he is unable to point to a specific person not within his protected classes, whom was treated more favorably than he, his theory of liability is that he was treated worse than everyone else who was not a Muslim, and was not originally from Egypt. The reasons for his discriminatory treatment, was the disdain for his protected classes, by his managers, Ms. Adamek, Mr. Jerbasi, and some of his coworkers. Reasonable inferences being taken into account in his favor, Petitioner has shown that based on their statements, including those made directly to him, and about him (in the form of taunting) displayed discriminatory intent, regarding decisions about his terms and conditions of employment. There is no evidence that any person other than he requested a specific time to pray, as there is no evidence that any other Muslim (who require praying five times daily and specific times) was working on the site. However, Mr. Russell showed a preference for the non-Muslim personnel, by not changing her lunch hour to reasonably accommodate Petitioner. Although there was mention of seniority, this was not proven, nor was there any objective evidence that seniority was the employer's standard to determine the time for lunch periods. The employer's blanket refusal to even attempt to accommodate Petitioner was evidence of religious animus against Petitioner. Additionally, there was record evidence, that Mr. Russell repeatedly harassed Petitioner by mocking his accent, his name, and by falsely accusing him of work errors he had not committed. Regarding his suspension, a reasonable inference can be made that Petitioner was not replaced by an Egyptian Muslim, as based on information and belief, there were no such other employees at his site.

Regarding his hostile work environment claims, it appears that the lower court as well as the District Court have determined that what Petitioner endured could not constitute such an environment, as a matter of law. The lower court seems to have determined that a reasonable jury could not view Ms. Adamek's conduct (as well as Russell and Wilson's conduct) as discriminatory. It opined that perhaps this could have been so, if Petitioner was called out of his name (in fact on the last incident, he was called out of his name). The lower court seems to have missed the issue, that taunting a person based on their national origin can encompass different means. Here, Ms. Adamek initially told Petitioner that his name was bad, and that he needed to change it immediately. There is no dispute that the name is Egyptian (and perhaps Islamic). Here, Petitioner is being harassed based on his national origin. Adamek's continued conduct in stating his name, and then shaking her head up and down, cannot be said to be innocent behavior as a matter of law. *Aman*, supra. At a minimum, there is a genuine issue of material fact as to whether her statements and nonverbal acts were based on a discriminatory intent. Additionally, the other mocking of Petitioner and directing politically inflammatory remarks at him, also could reasonably be found to be based on illegal discrimination by a jury. Here, not only has the Third Circuit made an improper inference of what Adamek's and the other personnel's statements and nonverbal acts, meant, but it refused to make proper inferences in Petitioner's favor. Certainly, a reasonable jury could intepret that the remarks and acts were meant to harass Petitioner based on his national origin and/or religion. There was no preface Adamek was saying good morning or otherwise being pleasant to Petitioner, such that her

conduct must be held to be "innocent" as a matter of law. Rather, Petitioner's testimony reflected that her demeanor was of disdain for him, and each event negatively affected him. At the time of the harassment, Mr. Eldeeb was in his late forties. It is reasonably unbelievable that he would be expected to tolerate this conduct for any period of time, let alone for up to twenty times. It appears that the lower court has stated that the number of incidents, e.g. less than twenty times, is not severe and pervasive. Petitioner disagrees. A one time insult of his national origin, religion and culture, was more than should have been required to be tolerated. Here, the issue of name taunting is more serious than for some other groups, because Petitioner has testified and deposed of the importance of the name in his religion and culture (that the name is "God given"). A reasonable jury could determine that all Adamek's, Russell's and Wilson's comments about Petitioner, and people of the Middle East, amounted to severe and pervasive discrimination. The Third Circuit has upheld the possibility of finding a hostile work environment with much less evidence, including evidence that is entirely circumstantial, than Petitioner has produced here. The taunting of his Egyptian name, that is based at least in part on his religion, more than meets the standard for showing an intent to discriminate against him on his membership in protected classes. Additionally, the Third Circuit has held that there is no "magic" number of incidents that presents a threshold to determine whether a work environment is hostile in violation of Title VII. *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 748 (3d Cir. 1995). So, it is improper for the Third Court to state or infer that some "twenty" incidents of the taunting described above, even if not combined with the other incidents Plaintiff produced, could not

be found by a jury, to constitute or create a hostile work environment.

There was a genuine issue of material fact as to whether Petitioner was subjected to illegal retaliation in violation of Title VII. Here, the lower court seems to have dismissed his claims on two basis. First, it found that there was not enough of a nexus between his complaint, and the adverse action, although everything occurred in less than a week. Second, it found that because Allied offered to bring Petitioner back to work some time later, around a month, that as matter of law, its acts could not have been based on retaliation. Neither of these rationales meets the previously stated standards for determining retaliation cases. Here, there is virtually no time between Petitioner's complaint of discrimination and the adverse action. Additionally, Petitioner has produced evidence (direct) of Mr. Wilson's intent to get him off of the site, because of his complaint. Based on his statement, a reasonable jury could determine that the adverse employment action, was based retaliation. The written statement provides indisputable evidence of a nexus between the protected activity, and the adverse action. At a minimum, there is a reasonable inference that can be drawn in Petitioner's favor, that the decision for adverse action, was based on retaliation. The issue of Allied's attempt to resolve the matter of suspending Petitioner without pay, particularly after he had complained to the PHRC, has nothing to do with the intent of its original decision. Such later employment offer could not take away the harm that had already occurred, including lost pay and benefits. Additionally, Petitioner's testimony is not rebutted that Allied refused to take corrective actions to protect him from future harassment based on his

national origin and/or religion, rather it admonished him to either simply tolerate any such conduct, or to request to take the rest of the day off. These factors, would allow a reasonable jury to find that illegal retaliation occurred.

As stated above, because there was sufficient evidence that Petitioner was factually fired or laid off, he met the legal standard to establish a claim that he was constructively discharged. It was erroneous for the Third Circuit to opine that he was not constructively discharged, simply because Allied later offered him to come back to work, particularly when it did so only after he had filed a complaint with the PHRC, and under its procedures the company would have received notice of the complaint, prior to the time that it made the job offer. The Third Circuit, nor the district court cited any law to support their apparent findings that the constructive discharge claim could be obviated by offering the employee a new position a month after they stopped employment.

CONCLUSION

In summary, the Third Circuit has not followed its precedents for all of Petitioner's discrimination and retaliation claims. It has erroneously decided what the employer's (and Ms. Adamek's) intent was, clearly jury questions. It has decided as a matter of law that national origin taunting of over twenty incidents could not create a hostile work environment, when is precedents stated above, have established that there is no set number of incidents for such claim. It has violated the Supreme Court's standards for dismissing claims on summary judgment, by ignoring the Plaintiff's evidence, by making inferences from the

evidence in the employer's favor, rather then in the employee's favor, and by arbitrarily determining that genuine issues of material fact did not exist, when they clearly did on all of the claims. For all of the reasons stated above, Petitioner requests that the United States Supreme Court grant his Petition for Certiorari.

Respectfully Submitted,

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APPENDIX

APPENDIX

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4004

[Filed September 16, 2010]

OSAMA ELDEEB,
Appellant

v.

ALLIEDBARTON SECURITY SERVICES, L.L.C.; IMS HEALTH, INC.; VERA ADAMEK

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-07-cv-00669)
District Judge: Hon. Michael M. Baylson

Submitted Under Third Circuit LAR 34.1(a)
September 13, 2010

Before: SLOVITER, BARRY and SMITH,
Circuit Judges

Filed: September 16, 2010

OPINION

SLOVITER, *Circuit Judge*.

In this employment discrimination case, Osama Eldeeb ("Eldeeb") appeals the District Court's grant of summary judgment in favor of AlliedBarton Security Services, LLC ("AlliedBarton"), IMS Health, Inc. ("IMS"), and Vera Adamek ("Adamek"). We will affirm.[1]

Eldeeb was born in Egypt and practices the Islamic faith. AlliedBarton is a contract security company that provides security services and personnel to the IMS building in Plymouth Meeting, Pennsylvania. In 2003, AlliedBarton hired Eldeeb to work as a security officer at the IMS building.

In January 2004, Eldeeb was introduced to Adamek, an IMS employee. Upon learning that Eldeeb's first name was "Osama," Adamek said, "[t]hat's [a] very bad name" and "I think you have to change [it]," App. at 546, because the name is shared by al-Qaeda leader Osama bin Laden. Eldeeb's supervisor heard the comment and perceived that Eldeeb was upset, but he considered the situation resolved after he asked Adamek to be more sensitive and told Eldeeb that Adamek meant no offense.

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[1] The District Court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291.

Over the next six months, Eldeeb encountered Adamek in passing ten to twenty more times. During each encounter, Adamek said Eldeeb's first name and nodded affirmatively. On July 19, 2004, Adamek introduced Eldeeb to her son as "you['re] Sad[d]am," but then corrected herself, "Oh, no, you're Osama." App. at 553. Eldeeb complained to IMS, perceiving that Adamek's introduction was a reference to former Iraqi president Saddam Hussein, and a human resources coordinator from AlliedBarton investigated.

On July 22, 2004, the next day Eldeeb worked, Troy Martzell, AlliedBarton's Human Resources Coordinator,[2] asked Eldeeb what had happened and asked if he wanted to be transferred to a different post. Eldeeb agreed he could accept another location. The next day, Rocky Owens of AlliedBarton told Eldeeb that "we are with you" and "we [are] working to find [an]other place for you." App. at 561.

On Monday, July 26, the facility manager at the IMS building – an employee of C.B. Richard Ellis, Inc., a property management company that is not a party to this action – reported to AlliedBarton that Eldeeb was "sitting on the tailgate of his vehicle [over the weekend shift] for approximately 2-3 hours each day" instead of "continually patrolling the building." App. at 518. The facility manager asked AlliedBarton to remove Eldeeb from his post at the IMS building. The facility manager was authorized to make such a request under the management agreement with IMS, and there were

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[2] The record and the parties' briefs contain different spellings of Martzell's last name. We use the spelling from his January 9, 2008 deposition.

four to six "other occasions where [he] . . . requested that an [AlliedBarton] employee be removed from the IMS . . . account for performance-related reasons." App. at 131.

On July 29, Martzell told Eldeeb that he had been removed because of the facility manager's report. However, Owens also told Eldeeb that "[w]e are going to work with you and find you another site and soon we will find something." App. at 565. Owens told him that "[a]s soon as we find something, we will call you." App. at 565. AlliedBarton representatives "never said" that Eldeeb was fired. App. at 566-67.

The next day, July 30, an AlliedBarton representative called Eldeeb on his cell phone and left a message offering a part-time position "until something else became available that was full-time." App. at 654. Eldeeb did not return the call or otherwise respond to AlliedBarton's offer. Instead, Eldeeb filed a charge with the Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission alleging retaliation and discrimination based on national origin and religion.

Eldeeb's manager at AlliedBarton did not know about the charge and continued trying to find Eldeeb another position. A few weeks after Eldeeb filed the charge, AlliedBarton offered Eldeeb a full-time position that paid a higher wage than he earned at the IMS facility and that accommodated Eldeeb's request to have Fridays off. Eldeeb did not respond to this offer, either.

In February 2007, after exhausting his administrative remedies, Eldeeb filed a complaint in

the United States District Court for the Eastern District of Pennsylvania against AlliedBarton, IMS, and Adamek, alleging a hostile work environment, unlawful termination, retaliation, and constructive discharge based on his religion and national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c) ("Title VII"), and similar provisions of the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. §§ 951-963.

The District Court granted summary judgment in favor of AlliedBarton, IMS, and Adamek. With respect to AlliedBarton, the District Court concluded that (1) Adamek's conduct in saying Eldeeb's name "in a demeaning way" and making a mis-introduction on a single occasion was not "severe" or "pervasive" for purposes of a hostile work environment claim, App. at 12-13; (2) Eldeeb showed no adverse action for purposes of his unlawful termination and retaliation claims because "[n]o one ever told [him] he was terminated," App. at 14, and, on the contrary, AlliedBarton offered him other jobs; and the working conditions were not "so unpleasant or difficult that a reasonable person in [Eldeeb]'s shoes would resign" for purposes of a constructive discharge claim, App. at 15 (quoting *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984)).

With respect to IMS and Adamek, the District Court concluded that they were entitled to summary judgment because they were not Eldeeb's "employer" under Title VII and the PHRA, and because there was no underlying PHRA violation on which to ground an aiding and abetting claim under 43 P.S. § 955(e).

Our standard of review over the District Court's grant of summary judgment is plenary. *See McGreevy v. Stroup*, 413 F.3d 359, 363 (3d Cir. 2005). Although Eldeeb argues that "[t]he District Court ignored numerous genuine issues of material fact," Appellant's Br. at 21, he does not clearly articulate what those issues are because his brief lacks appropriate citation to the record.[3] We have conducted our own independent examination and find that summary judgment was proper for the reasons stated by the District Court. The District Court aptly noted that "[t]his may have been a different case if [Eldeeb] had been called 'Osama' while at work and it was not his given name." App. at 13. Here, however, "Osama" was Eldeeb's given name.

Eldeeb argues that "building security cameras would reveal that he had performed his duties as required" and states that "there is some evidence to suggest" that those tapes "may have been destroyed," thus showing pretext. Appellant's Br. at 12. The "evidence" on which Eldeeb relies is a page of his summary judgment memorandum of law that itself contains no citation to record evidence.[4] What the record does contain is an affidavit from an AlliedBarton manager stating that "[t]here was no . . . monitoring, electronic or otherwise . . . , which would

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[3] AlliedBarton correctly notes that Eldeeb's brief does not comply with Federal Rules of Appellate Procedure 28(a)(7) and 28 (a)(9), which require appropriate references to the record.

[4] We note that "[m]emoranda of law in the district court should not be included in the appendix unless they have independent relevance." Fed. R. App. P. 30(a)(2).

have confirmed or denied whether Mr. Eldeeb made his rounds . . . ." App. at 591.

The temporal proximity of a few days between Eldeeb's complaint about Adamek and the facility manager's complaint about Eldeeb, which brought about Eldeeb's transfer, requires closer scrutiny. The District Court held that "[w]hile the amount of time between Mr. Eldeeb's complaint and his removal from the IMS facility is noted by the Court, it is simply not suggestive enough to infer a causal connection." App. at 18. We agree. AlliedBarton offered Eldeeb multiple positions after his complaint and offered to pay Eldeeb more than he was earning at IMS, all the while accommodating Eldeeb's scheduling request.[5] Eldeeb did not bother to respond. Moreover, Eldeeb does not dispute that AlliedBarton removed him from the IMS facility because the facility manager from C.B. Richard Ellis, Inc., requested it.[6] Eldeeb points to no evidence that AlliedBarton did so because of his religion, his national origin, or his earlier complaint.

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[5] Eldeeb argues, without citation to the record, that the offer "apparently was in response to [his] filing of a discrimination / retaliation complaint . . . ." Appellant's Br. at 35. However, the record reflects that the AlliedBarton manager who offered Eldeeb the positions did not find out about the discrimination charge until "sometime in September of '04," App. at 660, after he had extended the offers to Eldeeb.

[6] Eldeeb sued the facility manager in a separate action, which the parties settled. *See Eldeeb v. CB Richard Ellis, Inc.*, No. 2:05-cv-03839 (E.D. Pa. July 20, 2006) (order dismissing case due to settlement).

For the reasons above, we will affirm the District Court's grant of summary judgment for the defendants.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-4004

[Filed September 16, 2010]

OSAMA ELDEEB,
Appellant

v.

ALLIEDBARTON SECURITY SERVICES, L.L.C.; IMS HEALTH, INC.; VERA ADAMEK

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-07-cv-00669)
District Judge: Hon. Michael M. Baylson

Before: SLOVITER, BARRY and SMITH,
Circuit Judges

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on September 13, 2010.

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the judgment of the District Court entered July 20, 2006, be and the same is hereby affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

Attest:

/s/Marcia M. Waldron
Clerk

DATED: September 16, 2010

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION
NO. 07-669

[Filed August 29, 2008]

OSAMA ELDEEB	)
	)
v.	)
	)
ALLIEDBARTON SECURITY SERVICES L.L.C., IMS HEALTH, INC., and VERA ADAMEK[1]	)
	)

MEMORANDUM RE: SUMMARY JUDGMENT

Baylson, J.: **August 28, 2008**

Presently before this Court are Defendants' Motions for Summary Judgment. After a careful

[1] In his Complaint, Plaintiff incorrectly identifies the defendants (naming them as "Allied/Spectraguard Security," "IMS Health" and "Vera Ademek"). The Court relies on Defendants' own briefings for their proper names. (Allied Mem. in Support of Mot. for Summary Judgment at 1; IMS Ans. at 1).

review of the record and all relevant case law, Defendants' Motions will be granted

I. Background

A. Factual Background

Osama Eldeeb (hereinafter "Plaintiff," "Mr. Eldeeb") was employed as a Security Officer by AlliedBarton Security Services, LLC (hereinafter "AlliedBarton") beginning in June, 2003. (AlliedBarton Statement of Facts ¶ 4, Pl. Statement of Facts ¶ 4). AlliedBarton is a contract security company that provides services and personnel to various companies. (Id. at ¶ 1). AlliedBarton provides its services to the IMS Health Building in Plymouth Meeting, Pennsylvania (hereinafter "IMS"), pursuant to a contract between AlliedBarton and C.B. Richard Ellis, Inc., formerly Insignia ESG (hereinafter "CBRE"). CBRE manages the IMS facility on behalf of IMS Health. (Id. at ¶ 2). AlliedBarton Account Manager Frank Wilson (hereinafter "Mr. Wilson") made the decision to hire Plaintiff as a Security Officer at the IMS facility. (Id. at ¶ 5). Jim Russell (hereinafter "Mr. Russell") served as his immediate supervisor. (Pl.'s Statement of Additional Material Facts at ¶ 8).

Plaintiff was born in Egypt and practices the Islamic faith. (Pl.'s Statement of Additional Material Facts ¶ ¶ 1-2). According to Plaintiff, the alleged harassment and discrimination began in and around early 2004 and continued until he stopped working at IMS on July 29, 2004. (Compl. ¶¶ 11, 15). Mr. Eldeeb alleges that one unnamed IMS employee made a negative reference to people in the Middle East, with the employee stating that he did not respect Muslims

for "killing people like that." (Id.). Plaintiff also alleges that Mr. Russell stated his name in a "mocking manner" on several occasions. (Id. at ¶ 2). On a separate occasion, Plaintiff alleges that Mr. Wilson approached Plaintiff at his work site on the day Sadaam Hussein was captured and said they had "gotten one" and now needed to "get the other one." (Id.)

Mr. Eldeeb also asked to change his lunch time with that of another AlliedBarton employee so that he could pray in accordance with his Islamic faith at the required time. AlliedBarton offered Plaintiff a choice between the twelve o'clock lunchtime and the twelve-thirty lunchtime. Although it appears that Mr. Eldeeb preferred the one o'clock lunchtime, Defendant AlliedBarton contends that the one o'clock lunchtime was held by a Security Officer with more seniority than Plaintiff. Mr. Eldeeb accepted the twelve-thirty lunchtime. (Def. AlliedBarton's Statement of Undisputed Facts, Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶¶ 61-63). Plaintiff contends that in accepting this lunch break, he repeatedly had to miss one of his five daily prayers. (Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 64).

The majority of alleged incidents occurred between Plaintiff and Vera Adamek (hereinafter "Ms. Adamek"), who was an employee at IMS. In January 2004, Mr. Wilson introduced Plaintiff to Ms. Adamek. Upon introduction, Ms. Adamek made a comment

about Mr. Eldeeb's name.[2] Ms. Adamek testified that she made this comment to Mr. Eldeeb out of concern that others might react negatively to the name "Osama." (Def. AlliedBarton Mot. for Summ. J., Ex. F, pp. 22-23). AlliedBarton alleges that Mr. Wilson spoke to Mr. Eldeeb and to Ms. Adamek about the situation, in order to alleviate any concerns and prevent future incidents. (Def. Allied Barton Statement of Undisputed Facts at ¶¶ 16-17).

For six months following their introduction, the only interaction between Mr. Eldeeb and Ms. Adamek occurred when she entered or left the IMS building. This occurred fewer than twenty times in the six-month period. (Def. Allied Barton Statement of Undisputed Facts at ¶ 18, Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 18). Ms. Adamek testified that during each of these interactions, she would state Plaintiff's first name and nod to him affirmatively. (Id.). Mr. Eldeeb contends that Ms. Adamek said his name "as if in distaste" while passing Plaintiff (Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 18).

On July 19, 2004, Ms. Adamek and her son approached Plaintiff at his post in the IMS building and asked for a guest pass to allow her son to enter the

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[2] There is some disagreement as to the substance of Ms. Adamek's comment. Ms. Adamek contends that upon learning Plaintiff's name was "Osama," she stated "That's [a] very bad name" and "I think you should change it." (Def. Allied Barton's Statement of Undisputed Facts at ¶ 14). Plaintiff contends that Ms. Adamek told him that he "had to change" his name. (Pl.'s Resp. to Def. Allied Barton's Statement of Undisputed Facts at ¶ 14). The Court must take the facts in the light most favorable to Plaintiff.

building. As she was receiving the guest pass, Ms. Adamek introduced Plaintiff to her son, mistakenly identifying Mr. Eldeeb as "Sadam" before stating, "Oh no, you're Osama." (hereinafter "the July 19 incident"). (Def. Allied Barton Statement of Undisputed Facts at ¶ 20, Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 20). During his next break, Mr. Eldeeb approached the Administrative Assistant to a Vice-President of IMS, Christine Connover (hereinafter "Ms. Connover") and recounted the conversation between himself and Ms. Adamek. (Def. Allied Barton Statement of Undisputed Facts at ¶ 23, Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 23). On July 22, AlliedBarton's Human Resources Coordinator Troy Martzall (hereinafter "Mr. Martzall") approached Plaintiff and explained AlliedBarton's conflict resolution policy, stating that Mr. Eldeeb should have raised any concerns he had to AlliedBarton personnel rather than to an IMS employee. (Def. Allied Barton Statement of Undisputed Facts at ¶¶ 25-26, Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶¶ 25-26). Mr. Martzall and Mr. Eldeeb discussed a potential transfer, although Mr. Eldeeb stated that he would like to continue working for Mr. Wilson, but would accept a transfer to another position if it was in AlliedBarton's best interest. (Id.). Mr. Eldeeb continued to work at IMS after his meeting with Mr. Martzell (Id. at ¶ 29).

On July 23, 2004, AlliedBarton Recruiter Rocky Owens (hereinafter "Mr. Owens") contacted Plaintiff to inform him that the company was working on finding him another position. (Id. at ¶ 30). Plaintiff alleges that in this same conversation, Mr. Owens told him never to complain again if someone made a

discriminatory remark to him. (Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 30).

On July 24 and 25, Defendant AlliedBarton alleges that CBRE Facilities Manager John Jerbasi (hereinafter "Mr. Jerbasi") observed Plaintiff sitting on the tailgate of his car for approximately two to three hours each day when Plaintiff should have been patrolling the building. (Def. Allied Barton Statement of Undisputed Facts at ¶ 31). Plaintiff denies that this occurred. On July 26, Mr. Jerbasi reported Plaintiff's alleged behavior to Mr. Wilson and requested that Plaintiff be removed from his position at IMS. (Def.'s Allied Barton Statement of Undisputed Facts at ¶ 32). While Mr. Jerbasi denied knowing anything about discrimination against Mr. Eldeeb, Ms. Adamek recalled that she had discussed the July 19 incident with Mr. Jerbasi prior to July 24. (Def. AlliedBarton's Mot. for Summ. J., Ex. B, at ¶ 7; Ex. F, pp. 46-49).

On July 28, 2004, Mr. Wilson instructed Mr. Eldeeb to go to headquarters the following day. On July 29, Mr. Martzall met with Plaintiff and informed him that he had been removed from his position at IMS because he had been seen sitting on the tailgate of his vehicle during his work hours. (Def.'s Allied Barton Statement of Undisputed Facts at ¶ 43). On the same day, Plaintiff met with Mr. Owens, who said, "We are going to work with you and find you another facility and soon we will find something. As soon as we find something we will call you." (Def. Allied Barton Statement of Undisputed Facts at ¶ 44, Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 44). Plaintiff alleges that in this same conversation, Mr. Owens told him that if and when another position was found, if someone made any discriminatory

remark to him, he was to "just take it" or ask for a day off. (Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 44). Neither Mr. Owens nor Mr. Martzall told Mr. Eldeeb that he was terminated. (Def. Allied Barton Statement of Undisputed Facts at ¶ 45, Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 45).

At some point, AlliedBarton offered Plaintiff a part-time position.[3] Mr. Eldeeb never responded to this offer. (Def. Allied Barton Statement of Undisputed Facts at ¶ 48, Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 48). In August, 2004, AlliedBarton alleges it offered Plaintiff a full-time position which met Plaintiff's schedule and paid a higher salary than the one he received while at IMS. (Def. Allied Barton's Statement of Undisputed Facts at ¶ 50). Plaintiff did not take this position, as he did not trust AlliedBarton and has stated he would not have accepted any position from them. (Def. Allied Barton's Statement of Undisputed Facts at ¶ 55, Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 55).

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[3] Mr. Eldeeb and AlliedBarton disagree as to the date this position was offered, although both agree that it was offered. AlliedBarton also contends that Plaintiff was offered the only position in the area that was available and met his scheduling requirements, and was offered this part-time position until a full-time position became available. (Def.'s Allied Barton's Statement of Undisputed Facts at ¶ 47). Mr. Eldeeb denies any knowledge of such facts. (Pl.'s Resp. to Def. AliedBarton's Statement of Undisputed Facts at ¶ 47).

B. Procedural History

Plaintiff filed a charge against AlliedBarton and IMS with the Pennsylvania Human Relations Commission relating to his employment with AlliedBarton after he was removed from IMS. (Def.'s Statement at 57, Pl.'s Resp. at 57). These charges were cross-filed with the United States Equal Employment Opportunity Commission (hereinafter "EEOC"), and Plaintiff received right to sue letters. (Compl. at ¶ 6).

Plaintiff filed this Complaint on February 20, 2007 (Doc. No. 1). Defendants filed Motions for Summary Judgment (Doc. Nos. 21, 22). Plaintiff filed a Response to Defendants' motions (Doc. No. 25). Defendants filed Reply briefs to Plaintiff's Response (Doc. Nos. 26, 27). Upon the Court's request, Plaintiff filed a statement of undisputed facts (Doc. Nos. 29, 30, 31). Defendants filed responses to these filings (Doc. Nos. 32, 33). The Court initially scheduled oral argument in this case, but upon further consideration of all issues, concluded that both parties' briefings were sufficient and that oral argument was therefore unnecessary.

Plaintiff's complaint contains ten counts. Counts One and Two allege violations of Title VII by all Defendants due to a hostile work environment based on religion and national origin, respectively. Counts Three and Four allege violations of Title VII by Allied Barton due to termination based on religion and national origin, respectively. Counts Five and Six allege violations of Title VII by AlliedBarton due to constructive discharge based on religion and national origin, respectively. Count Seven alleges a violation of Title VII by all Defendants due to retaliation. Counts Eight, Nine and Ten allege violations of the

Pennsylvania Human Relations Act by all Defendants based on religion, national origin and retaliation, respectively.

II. Parties' Contentions

A. Defendants' Motions for Summary Judgment

1. AlliedBarton

AlliedBarton argues that it is entitled to summary judgment on Mr. Eldeeb's hostile work environment claim because Plaintiff cannot establish that he was subjected to harassment based on his national origin or religion. AlliedBarton contends that Ms. Adamek's comments were not severe or pervasive, a reasonable person would not be detrimentally affected by the conduct, and that once AlliedBarton became aware of the alleged harassment, it took prompt remedial action. With respect to Plaintiff's discrimination claim, AlliedBarton argues that Plaintiff has no direct evidence of discrimination. AlliedBarton contends that Plaintiff cannot establish a prima facie case of discrimination based on either religion or national origin discrimination, Plaintiff cannot establish an adverse employment action because he was not terminated or constructively discharged, and Plaintiff cannot identify others of a different religion or national origin who were treated differently. AlliedBarton contends that it has a legitimate non-discriminatory reason for Plaintiff's treatment, and that Mr. Eldeeb has no evidence this reason was pretextual. With respect to Plaintiff's retaliation claim, AlliedBarton argues that Plaintiff cannot establish a prima facie case, as Plaintiff's complaint to IMS was not protected activity. AlliedBarton further argues that Plaintiff's

alleged termination or constructive discharge were not adverse actions, that there is no causal connection between Plaintiff's alleged complaint and his removal from IMS, and that there is no causal connection between any of Plaintiff's alleged complaints and his failure to be reassigned. AlliedBarton states that it has a legitimate non-retaliatory reason for Plaintiff's removal from IMS, and that Mr. Eldeeb cannot show pretext. Finally, AlliedBarton argues that Plaintiff was not denied a religious accommodation.

2. IMS Health / Vera Adamek

IMS and Ms. Adamek (hereinafter "IMS defendants") argue that the Court should enter summary judgment against Plaintiff with respect to all Title VII claims because IMS had no employment relationship with Mr. Eldeeb and thus cannot be held liable under Title VII. IMS Defendants further argue that Ms. Adamek is an individual who cannot be held liable under Title VII. With respect to the PHRA claims, IMS Defendants contend that like Title VII, the PHRA does not authorize actions against individuals or actions against a non-employer defendant. IMS Defendants further argue that there is no evidence that IMS Defendants aided and abetted any alleged discrimination or retaliation by AlliedBarton against Mr. Eldeeb.

B. Plaintiff's Response

In his response, Plaintiff contends that he has met the standard to establish a hostile work environment. Mr. Eldeeb alleges that his requests for time to pray were denied, and that AlliedBarton and IMS employees did nothing to stop the intentional

discrimination and harassment he experienced while at work. Plaintiff alleges there is no evidence that any other person of any nationality or religion was treated similarly to him. Plaintiff believes there was no performance error on his part at his job and contends that there is a rationale inference that all three defendants collaborated in a plot to remove Plaintiff from IMS with false accusations of misconduct. Mr. Eldeeb contends that a reasonable person would be detrimentally affected by the work environment created by Defendants. With respect to his disparate treatment claims, Plaintiff alleges he has established a prima facie case of discrimination, and that he has shown Defendants' reason for firing him to be pretextual. Plaintiff argues that his "transfer" from IMS constituted an adverse action, as it was an indefinite suspension without pay and benefits and/or a demotion without pay and benefits. Plaintiff further contends that he was constructively discharged in violation of Title VII, arguing that he was subjected to working conditions that were made so intolerable that a reasonable employee in his position would have resigned. Plaintiff also contends that all defendants violated the PHRA, which uses the same legal standards as Title VII to determine discrimination complaints.

C. Defendants' Reply Briefs

1. AlliedBarton

In its reply, AlliedBarton contends that Plaintiff has failed to establish a viable hostile work environment claim, and that he introduces new evidence of allegedly hostile statements by Mr. Wilson and Mr. Russell in his response. Plaintiff contends

these newly raised allegations should be disregarded. AlliedBarton argues that Plaintiff has not established a claim of national origin or religious discrimination, as he fails to make a prima facie discrimination claim, he fails to refuse AlliedBarton's non-discriminatory reason for its actions, and he fails to establish any form of pretext. AlliedBarton also contends that Plaintiff has failed to establish a claim of retaliation, as he fails to establish that he suffered from an adverse action, and fails to produce evidence of a causal connection between any complaints about harassment and his removal from IMS.

2. IMS Defendants

IMS Defendants argue that no dispute of material fact exists. They further contend that there is no evidence that IMS Defendants aided or were involved in any employment action relating to Plaintiff. They argue that there is no evidence that Ms. Adamek supervised Planitiff, and there is no evidence of an employment relationship.

III. Legal Standard

The burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) is the appropriate analysis for summary judgment motions in cases alleging employment discrimination. Holness v. Penn State University, No. 98–2484, 1999 U.S. Dist. LEXIS 6240, at *14 (E.D. Pa. May 5, 1999). In order to establish a *prima facie* case of discrimination, the plaintiff must demonstrate the existence of four elements: (1) he is a member of a protected class; (2) he is qualified for the position; (3) he was either not hired

or fired from that position; and (4) similarly situated nonmembers of the protected class were treated more favorably than the plaintiff. See Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410-11 (3d Cir. 1999).

If the plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a legitimate, non-discriminatory reason for the adverse employment action. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The defendant satisfies its burden of production by introducing evidence, which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). The defendant need not prove that the tendered reason actually motivated its behavior because the ultimate burden of proving intentional discrimination always rests with the plaintiff. Id.

If the defendant is able to come forward with a legitimate, non-discriminatory reason for its action, the plaintiff can defeat a motion for summary judgment by proffering evidence from which a factfinder could reasonably either (1) disbelieve the defendant's articulated legitimate reasons or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the defendant's action. Id. at 764. To discredit the defendant's proffered reason, the plaintiff cannot simply show that the defendant's decision was wrong or mistaken because the factual dispute at issue is whether discriminatory animus motivated the defendant's actions. Id. at 765. What is at issue is the perception of the decision maker, not the plaintiff's view of his own performance. Billet v. CIGNA Corp.,

940 F.2d 812, 825 (3d Cir. 1991) (citations omitted); see also Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1993), cert. denied, 510 U.S. 826, 114 S. Ct. 88, 126 L. Ed. 2d 56 (1993) (pretext turns on the qualifications and criteria identified by the employer, not the categories the plaintiff considers important).

IV. Discussion

A. AlliedBarton Security Services

1. Hostile Work Environment

Title VII and the PHRA make it unlawful for an employer to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such an individual's race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(a)(1) and 43 P.S. § 951.

In Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), the Supreme Court clarified the elements of a discrimination claim resulting from a hostile work environment. In order to fall within the purview of Title VII, the conduct in question must be severe and pervasive enough to create an "objectively hostile or abusive work environment - an environment that a reasonable person would find hostile - and an environment the victim-employee subjectively perceives as abusive or hostile." Harris at 21-22 In determining whether an environment is hostile or abusive, the Court must look at numerous factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it

unreasonably interferes with an employee's work performance." Id. at 23; Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001).

Plaintiff has not met his burden to show that the treatment he received while working for AlliedBarton at the IMS building amounted to discrimination. The conduct he alleges - that he did not receive his first choice for a lunchtime shift and that Ms. Adamek said his name in a demeaning way fewer than twenty times and mis-introduced him once - amounts to neither severe nor pervasive conduct. In Page v. Trustees of the Univ. of Pa., 222 F.Appx. 144, 146 (3d Cir. 2007), plaintiff brought a hostile work environment claim concerning the "tone" of her employer's comments. The Third Circuit found that the plaintiff alleged no comments that "without her testimony as to tone and manner, could be taken as derogatory, unprofessional, or motivated by animus . . . ." Id. at 146. In the present case, Ms. Adamek's greeting Plaintiff by name on a handful of occasions cannot be taken as derogatory or unprofessional. Indeed, greeting him by his own name is professional, or at worst, innocuous behavior.

This may have been a different case if Plaintiff had been called "Osama" while at work and it was not his given name. See Omari v. Waste Gas Fabricating Co., Inc., 2005 WL 545294, *12 (E.D.Pa. Mar. 4, 2005) (finding a hostile work environment when Plaintiff was called "Osama" by coworkers when his given name was Hocine). But calling Plaintiff by his own true name is simply not a cause for a viable harassment claim. The standard is an objective one in order to protect employers from the "hypersensitive" plaintiff. Andrews v. City of Philadelphia, 895 F.2d 1469, 1483 (3d Cir. 1990) ("The objective standard protects the

employer from the 'hypersensitive' employee, but still serves the goal of equal opportunity by removing the walls of discrimination . . . .").

As such, AlliedBarton is entitled to summary judgment on Plaintiff's hostile work environment claim.

2. Termination / Constructive Discharge

To establish a prima facie case of discriminatory termination or constructive discharge under Title VII or the PHRA, a plaintiff must show that (1) he is a member of a protected class; (2) he was qualified for the position he held; (3) he suffered an adverse employment action; and (4) "circumstances [] give rise to an inference of unlawful discrimination such as might occur when the position is filled by a person not of the protected class." Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410-11 (3d Cir. 1999).

For the purpose of this motion only, AlliedBarton does not dispute that Plaintiff can establish the first and second prong of his prima facie case. AlliedBarton contends that Plaintiff's claim fails because Mr. Eldeeb cannot establish the third or fourth elements of his prima facie case.

Simply put, there is no evidence that Plaintiff suffered any adverse action. No one ever told Plaintiff that he was terminated. (Def. Allied Barton Statement of Undisputed Facts at ¶ 45; Pl.'s Resp. to Def. AlliedBarton's Statement of Undisputed Facts at ¶ 45). Indeed, Plaintiff admits that Mr. Owens told him, "We are going to work with you and find you another facility and soon we will find something. As soon as we

find something we will call you." (Def. Allied Barton Statement of Undisputed Facts at ¶ 44; Pl.'s Resp. to Def. AlliedBarton's Statement of Undisputed Facts at ¶ 44). While they disagree on the date of the offering, both Planitiff and Defendant AlliedBarton agree that AlliedBarton offered Mr. Eldeeb another position and Mr. Eldeeb never responded. (Def. Allied Barton Statement of Undisputed Facts at ¶ 48; Pl.'s Resp. to Def. AlliedBarton's Statement of Undisputed Facts at ¶ 48). Plaintiff stated in his deposition, and admitted in his Response to Defendant's Statement of Undisputed Facts, that after being removed from the IMS facility, Mr. Eldeeb did not trust AlliedBarton and would not have accepted any position from the company. (Def. Aliled Barton's Mot. for Summary Judg., Ex. C, pp. 102-103; Def. Allied Barton Statement of Undisputed Facts at ¶ 55; Pl.'s Resp. to Def. AlliedBarton's Statement of Undisputed Facts at ¶ 55). It was and is Plaintiff's prerogative to reject employment from AlliedBarton; he was under no obligation to accept the position. But the fact that it is undisputed that a position was offered and that Plaintiff rejected it of his own accord shows that he was not terminated from his employment.

A plaintiff who voluntarily leaves his employment may make a case of constructive discharge if "the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." Goss. v. Exxon Office Systems Co., 747 F.2d 885, 887-88 (3d Cir. 1984). This is not the case here. The conduct complained of (which this Court discussed above as innocuous) was almost entirely committed by Ms. Adamek and occurred at the IMS facility. As Mr. Eldeeb was going to be transferred

from the IMS facility to a new position, he would not have encountered Ms. Adamek or any other IMS employees at his new job. A reasonable person in his shoes would not have predicted his new job to be so unpleasant or difficult that he would have resigned.

The fourth prong is also problematic for Plaintiff. To make his prima facie case, a plaintiff must show that similarly situated persons who are not members of the protected class were treated more favorably, or that the circumstances of the plaintiff's termination give rise to an inference of discrimination. Clinkscales v. Children's Hosp. of Philadelphia, 2007 WL 3355604, *4 (E.D. Pa. Nov. 9, 2007) (internal citations omitted). Plaintiff has offered no evidence that AlliedBarton treated him any differently than the company treats other non-Egyptian, non-Muslim employees. In his Response, Plaintiff alleges that there is no evidence that any other person of any nationality or religion was treated similarly to him. But Plaintiff misunderstands his burden. It is not Defendant's burden to show evidence that others were treated similarly to him; it is Plaintiff's burden to show that others who are similarly situated but who are not members of the protected class were treated more favorably. Id. While Plaintiff argues that he was treated dissimilarly and disfavorably than persons outside of his protected classes, he offers nothing to support this contention. Plaintiff has failed to meet his burden, and thus summary judgment must be granted in favor of AlliedBarton on these claims.

3. Retaliation

In order to state a claim of retaliation, Plaintiff must demonstrate: (1) he engaged in activity protected by Title VII; (2) he was subjected to an action by his employer that was materially adverse; and (3) the materially adverse action by the employer was causally related to his protected activity. Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995); Ascolese v. SEPTA, 2008 WL 2165102 (E.D.Pa. 2008). An employer's action is considered materially adverse if it would dissuade a reasonable person from making or supporting a charge of discrimination. Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006). Once the prima facie case has been established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment action in question. Quiroga v. Hasbro Inc., 934 F.2d 497, 501 (3d Cir. 1991), cert denied 502 U.S. 940 (1991). The plaintiff must then demonstrate that the employer's explanation is pretextual. Waddell v. Small Tube Prods. Inc., 799 F.2d 69, 73 (3d Cir. 1986).

Plaintiff's retaliation claims are also reviewed under the McDonnell-Douglas standard, as he is proceeding under a pretext theory. Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997). In order to state a claim of retaliation, Plaintiff must demonstrate: (1) he engaged in activity protected by Title VII; (2) he was subjected to an action by his employer that was materially adverse; and (3) the materially adverse action by the employer was causally related to his protected activity. Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995); Ascolese v. SEPTA, 2008 WL 2165102 (E.D.Pa. 2008). An employer's action is considered materially adverse

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Protected activities under the ADA generally include (1) opposition to a practice made unlawful under the ADA; and (2) participation in an ADA investigation, proceeding, or hearing by making a charge, testifying, or otherwise assisting in the investigation. See 42 U.S.C. 12203(a); Merit v. Southeastern Pa. Transp. Auth., 315 F.Supp.2d 689, 704 (E.D.Pa. 2004). Informal charges or complaints of discrimination, as well as informal requests for accommodation, are sufficient to constitute protected activities for establishing a prime facie case of retaliation. See Barber v. CSX Distrib. Servs., 68 F.3d 694, 701-2 (3d Cir. 1995); Kaniuka v. Good Shepherd Home, 2006 WL 2380387, *9 (E.D.Pa. Aug. 15, 2006).

Assuming that Plaintiff's activities are protected under the ADA, Plaintiff fails to meet prongs two and three. As discussed above, there is no evidence that Plaintiff suffered any adverse action. Furthermore, even if AlliedBarton's removal of Plaintiff from the IMS facility were a materially adverse action, there is no evidence that the adverse action was causally related to his protected activity. While a plaintiff can demonstrate a causal connection by showing temporal

proximity between the protected activity and the adverse employment action, the timing of the allegedly retaliatory action must be "very close" or "unusually suggestive" of retaliatory motive before a causal link will be inferred. Merit v. Southeastern Pennsylvania Transit Authority, 315 F.Supp.2d 689, 707 (E.D.Pa. 2004) (internal citations omitted). While the amount of time between Mr. Eldeeb's complaint and his removal from the IMS facility is noted by the Court, it is simply not suggestive enough to infer a causal connection. The Court is even more convinced of this fact because it is undisputed that AlliedBarton offered Plaintiff another position with the company.

As such, summary judgment will be granted with respect to Plaintiff's retaliation claims against AlliedBarton.

4. PHRA claims

The analysis under Title VII and the PHRA are identical, as Pennsylvania courts have construed the protections of the two acts interchangeably. Weston v. Pennsylvania, 251 F.3d 420, 426 n.3 (3d Cir. 2001). As explained above, summary judgment will be granted with respect to Plaintiff's Title VII claims against AlliedBarton. That analysis applies with equal force to Plaintiff's PHRA claim. Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 382 (3d Cir. 2002). As such, summary judgment will be granted with respect to Plaintiff's PHRA claims against AlliedBarton.

B. IMS Health, Inc.

1. Title VII Claims

The threshhold question in considering liability under a Title VII analysis is whether the defendant is the plaintiff's employer. Rodriguez v. Lauren, 77 F.Supp.2d 643, 646 (E.D.Pa. 1999); Cameron v. Infoconsulting Intern., Inc., 2006 WL 1450842, *6 (E.D.Pa. May 23, 2006). Section 954(b) defines the term "employer," although its definition does not provide much guidance in determining whether a company in the position of IMS would be considered an employer of Mr. Eldeeb. As noted in Cameron, the Supreme Court has adopted traditional agency law criteria "in interpreting the meaning of 'employer' in a statute that does not helpfully define it.'" Cameron at *5, citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992). Among other factors relevant to this inquiry are the hiring party's right to control the manner and means by which the product is accomplished, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the tax treatment of the hired party, and the method of payment and provision of employee benefits. Id.

In the present case, Mr. Eldeeb was hired and employed by AliledBarton. It was an AlliedBarton Account Manager, Mr. Wilson, who made the decision to hire Plaintiff as a Security Officer at the IMS facility. Mr. Eldeeb testified that he was not compensated by IMS or provided insurance or any other benefits by IMS. (IMS Defs. Mot. for Summ. J., Ex. E, pp. 151-52). AlliedBarton was responsible for

the payment of Mr. Eldeeb's paycheck and for withholding money for tax purposes. (Id. at 44, 152). Simply because IMS asked for Mr. Eldeeb to be transferred does not establish that IMS was Mr. Eldeeb's employer. See Cimino v. Borough of Dunmore, 2005 WL 3488419, *8 n.4 (M.D.Pa. Dec. 21, 2005). (determining that the relevant inquiry in a similar situation was not whether a company had input into a termination, but rather whether it could actually terminate the employment in question). And while it may be true that IMS asked for Mr. Eldeeb's removal from his position at IMS, IMS had to make such a request through AlliedBarton, as IMS had no power to remove Mr. Eldeeb itself.

As such, it is clear to this Court that IMS was not Mr. Eldeeb's employer, and thus cannot be held liable under Title VII.

2. PHRA Claims

As noted above, the PHRA is applied in accordance with Title VII. Davis v. Sheraton Society Hill Hotel, 907 F.Supp. 896, 899 n.1 (E.D.Pa. 1995). Like Title VII, the definition of an employer under the PHRA cannot be construed to include "employees;" indeed, "employee" is separately defined as a different term under the Act. See 43 Pa. Cons. Stat. Ann. 954(b), (c). Section 955(a) of the PHRA declares that only an "employer" may be held liable. As IMS is not Mr. Eldeeb's employer, it cannot be held liable under this section.

A different section of the PHRA, however, contemplates liability that extends beyond that of Title VII. Section 955(e) forbids "any person, employer,

employment agency, labor organization or employee, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice . . . ." 43 Pa. Cons. Stat. Ann. 955(e); Dici v. Com. of Pa., 91 F.3d 542, 552-53 (3d Cir. 1996). IMS qualifies under Section 955(e); thus, the remaining question is whether IMS may have aided and abetted the unlawful discriminatory practices of Mr. Eldeeb's employer.

Non-employers, such as IMS, cannot violate PHRA Section 955(e) when there is no corresponding Section 955(a) violation by an employer to aid and abet. See Kaniuka v. Good Shepherd Home, 2006 WL 2380387, *10 (E.D. Pa. Aug. 15, 2006). As stated above, this Court will grant summary judgment on Plaintiff's claims of unlawful discrimination and retaliation in violation of the PHRA as to Defendant employer AlliedBarton, and therefore defendant IMS cannot be liable for aiding and abetting any allegedly discriminatory practices of Plaintiff's employer.

As such, summary judgment will be granted with respect to Plaintiff's PHRA claims against Defendant IMS.

C. Vera Adamek

1. Title VII Claims

Title VII does not authorize actions against individuals. Sheridan v. E.I. Dupont de Nemours, 100 F.3d 1061, 1077-78 (3d Cir. 1996) (concluding that "Congress did not intend to hold individual employees liable under Title VII); see also Foxworth v. Pennsylvania State Police, 2005 WL 840374, *4

(E.D.Pa. Apr. 11, 2005). Plaintiff admits that Ms. Adamek was an employee of IMS and that she did not supervise Mr. Eldeeb. (Pl's Resp. to IMS Defs Statement of Facts at 26, 33). Although Mr. Eldeeb alleges that Ms. Adamek had a "working relationship" with AlliedBarton, there is no evidence to support a Title VII claim to proceed against her. As the only proper defendant in a Title VII case is the employer and Ms. Adamek is an individual, summary judgment will be granted on Counts One, Two and Seven with respect to Ms. Adamek.

2. PHRA Claims

Just as IMS is not Mr. Eldeeb's employer, as decided above, Ms. Adamek cannot be held liable under this section.

As noted above, non-employers, such as Ms. Adamek, cannot violate PHRA Section 955(e) when there is no corresponding Section 955(a) violation by an employer to aid and abet. As this Court has found AlliedBarton to have committed no such violation, Ms. Adamek cannot be liable for aiding and abetting any allegedly discriminatory practices of Plaintiff's employer.

As such, this Court will grant summary judgment with respect to the PHRA claims against Ms. Adamek.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 07-669

[Filed August 29, 2008]

OSAMA ELDEEB	)
	)
v.	)
	)
ALLIEDBARTON SECURITY SERVICES L.L.C., IMS HEALTH, INC., and VERA ADAMEK	)

ORDER

AND NOW, this 28th day of August, 2008, upon careful review of the motions and briefings, it is hereby ORDERED that Defendant AlliedBarton's Motion for Summary Judgment (Doc. No. 22) is GRANTED, and Defendants IMS Health, Inc. and Vera Adamek's Motion for Summary Judgment (Doc. No. 21) is GRANTED. The clerk shall close the case.

BY THE COURT:

/s Michael M. Baylson

Michael M. Baylson, U.S.D.J.

O:\Clare\Eldeeb v. AlliedSpectraguard 07-669\Eldeeb Motion for Summary Judgment.wpd

APPENDIX C

SPECTAGUARD
INTEGRATED ASSET PROTECTION

Disciplinary/Counseling Statement
Date: 7/28/04

EMPLOYEE NAME: OSAMA ELDEEB	**EMPLOYEE #:** 135047
ADDRESS: 631 SPRUCE ST APT L 10 ROYERSFORD, PA. 19468	**REGION:** MID-ATLANTIC **DEPARTMENT/SITE:** IMS **POSITION:** SECURITY OFFICER

TYPE OF ACTION: ___ COUNSELING
___SUSPENSION (DATES)
✓ WRITTEN WARNING
___ TERMINATION
FINAL WARNING AND REASSIGNMENT

NATURE OF INFRACTION:
___ Safety Violation ___ Absenteeism/Tardiness
___ Insubordination ___ Refusal to follow instructions ___ Violation of Company Policy
___ Part ___ Offense # ___ Page

Supervisor's Remarks: (Please give complete explanatory remarks regarding the infraction above.) THE CLIENT, MR. JOHN JERBASI REPORTED THAT S/O ELDEEB WAS OBSERVED SITTING IN A TRUCK FOR SEVERAL HOURS BOTH SATURDAY, 7/24/04 & SUN. 7/25/04, DURING WHICH TIME HE SHOULD HAVE BEEN ROVING.

Acceptable standards: (SEE ATTACHED)

Plan of Action: (E.g., Coaching / Training / Assistance)

Follow-up: ___ A follow-up meeting will be held _____ (Be specific)
___ No follow-up necessary

Employee Remarks: Please check one of the boxes below and add any comments.

☐I agree with the statements above.
☒I disagree with the statement above.

It is not true because I was roving at that time outside. I eat my sandwitch. Also the roving time is not more than two hours | | | | entering to that bld. Registered at the computer It is not fair

I have read and understand the nature of this warning and further understand that any further violation of

any company policy will result in further disciplinary action up to and including termination. I also understand that if I disagree with the above I may submit a written statement, within five (5) days to my file and/or request a review by the Regional Human Resources Department.

Employee Signature /s/ Date: Jul/29/04

Witness Signature _____ Date: _____

Supervisor Signature _____ Date: _____

Account Manager /s/ Date: 7/28/04

Human Resources
Representative /s/ Date: | |

ORIGINAL PERSONNEL FILE • YELLOW
COPY EMPLOYEE • PINK COPY SUPERVISOR

REMARKS (CONTINUED):

MR. JERBASI ALSO COMPLAINED THAT S O ELDEEB ATTEMPTED TO MEET WITH THE PRESIDENT OF IMS AND VICE PRESIDENT OF IMS HUMAN RESOURCES REGARDING A STATEMENT BY AN IMS EMPLOYEE COMMENTING ON S/O ELDEEB'S FIRST NAME. MR. JERBASI BELIEVES THIS SHOULD HAVE BEEN BROUGHT TO THE ATTENTION OF THE SITE SUPERVISOR, JIMMY RUSSELL, OR THE ACCOUNT MANAGER, FRANK D. WILSON. MR. JERBASI BELIEVES A SITUATION EXISTS WHICH PREVENTS S/O ELDEEB FROM REMAINING AT IMS AND HAS ASKED THAT HE BE REMOVED.

APPENDIX D

E. Progressive Discipline

Disciplinary action will be taken when Company policies, procedures and work rules are violated. It is the policy of the Company to handle all employee performance deficiencies and misconduct in a consistent, timely and equitable manner, free from emotional overtones or personality differences. Generally, this policy is to be effected by use of progressive discipline. There are four basic elements in the progressive discipline process, as follows:

1. **Oral Warning**
2. **First Written Warning**
3. **Final Written Warning**
4. **Suspension Pending Termination**

These steps will be used in a progressive manner consistent with the severity of the policy violation and/or performance problem. However, the Company reserves the right to skip any step, in whole or in part, and move immediately to any further step including suspension pending termination as it deems necessary. Consequently, no employee may rely on these guidelines as "promises" or "agreements" by the Company to impose the discipline contained in the guidelines in any situation or prior to termination. Termination may occur without use of progressive discipline and without prior notice.

F. Criminal Records

Allied Security will not knowingly hire or retain employees who have been convicted of a felony or other specified offense as outlined in applicable state licensing laws. (The screening process and disqualifying offenses vary state by state.) As part of the screening and interview process, applicants will assist the Company in completing a criminal history check. A disqualifying offense found in a criminal record check will result in an applicant not being hired, or the termination of a current employee. Failure of an employee to disclose in his/her application a criminal conviction will result in termination regardless of whether the conviction is a disqualifying offense under applicable law.

In the event that a current employee is arrested while employed, a Criminal Review Panel will be convened to review the circumstances of the arrest. The Criminal Review Panel will meet with the employee to review the facts, hear the individual's version of the incident and then make a decision on the appropriate action to be taken, including possible termination.